IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BROOKE HOWIE, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-462-SLR
ELITE INFORMATION GROUP, INC., CHRISTOPHER K. POOLE, ALAN RICH, ARTHUR G. EPKER, III, ROGER NOALL, DAVID A. FINLEY, WILLIAM G. SEYMOUR, SOLUTION 6 HOLDINGS LTD., EIG ACQUISITION CORP., THOMAS A. MONTGOMERY, CHRIS TYLER and DOES 1-25,	)	
Defendants.	)	

MEMORANDUM ORDER

I. INTRODUCTION

Currently before the court is plaintiff Brooke Howie's application for attorney's fees arising out of plaintiff's class action litigation challenging the proposed merger of Elite Information Group, Inc. ("Elite") and Solution 6 Holdings, Ltd. ("Solution 6"). (D.I. 31) The proposed merger has since been abandoned, and the parties agree to dismiss the litigation as moot. The court reserves jurisdiction to consider the instant application.[1] For the reasons that follow, plaintiff's fee application is denied.

[1]The court agrees with the determination of Judge Letts of the Central District of California that the present action should not be remanded to state court, particularly in light of the abandonment of the merger.

II. BACKGROUND

Formed in May 1999, Elite is a Los Angeles-based software company which is engaged in providing legal and accounting products focused primarily on time tracking, billing and internal accounting. Elite's stock is publicly traded on the NASDAQ, and as of February 14, 2000, Elite had over 9.3 million shares outstanding held by hundreds of shareholders. (Amend. Compl. ¶ 5) In late December 1999, Elite disclosed that it had already posted $6.86 million in earnings in 1999, and expected to post earnings of $9.15 million for fiscal year 2000 for a growth of more than 33%. (D.I. 40, Ex. A)

In early August 1999, Elite was contacted by Chris Tyler ("Tyler"), the CEO of Solution 6, regarding a possible business combination.[2] Solution 6 is an Australian corporation engaged in the development and supply of software and associated services to accounting and law firms throughout Australia, New Zealand, Southeast Asia, South Africa, the United States and Europe. Elite entered negotiations with Solution 6 as well as two other prospective bidders ("First Bidder" and "Second Bidder"). On November 28, 1999, Solution 6 proposed an all-cash transaction at $11 per share.

[2]The facts surrounding the merger negotiations are taken from the affidavit of defendant Christopher K. Poole, Chairman and CEO of Elite. (D.I. 43)

On December 1, 1999, Elite's representatives advised First Bidder that discussions between Elite and another company had reached an advanced stage and urged First Bidder to respond quickly with a firm proposal. The next day, First Bidder sent a letter with an indication of interest at $11 per share. Elite advised First Bidder that a formal proposal was required to proceed with further negotiations, but no formal proposal was ever received by Elite.

On December 6, 1999, Elite's Board discussed a letter from Tyler stating that Solution 6 was prepared to withdraw its proposal unless Elite agreed to enter into exclusive negotiations with Solution 6 within 24 hours. Elite authorized the exclusivity agreement for one week, and Solution 6 continued due diligence during that time.

On December 9, 1999, Second Bidder sent a letter expressing frustration at Elite's exclusivity arrangement with Solution 6, and stated that subject to due diligence, it was interested in presenting an offer in the $12 to $13 price range. On December 12, 1999, Elite's Board discussed Second Bidder's letter and the status of negotiations with Solution 6, who threatened to terminate discussions if there was any further delay. Elite's Board decided to proceed with negotiations to reach a definitive agreement with Solution 6. On December 13, 1999, Elite received a second letter from Second Bidder indicating that it was prepared to offer a price of $12 per share subject to due

diligence review, and absent a response by the next day, it would consider other options with respect to its interests in Elite.

On December 14, 1999, Elite's Board reviewed the status of all indications of interest, and concluded that the agreement with Solution 6 at $11 per share was the best option.[3] On December 14, 1999, the Board approved the Merger Agreement in which EIG Acquisition Corp. ("EIG"), a subsidiary of Solution 6, would launch a tender offer to purchase all of the outstanding shares of Elite at $11 per share. EIG would then be merged with and into Elite, with each share of Elite stock then outstanding being converted into the right to receive $11 in cash.[4] On December 15, 1999, Elite issued a press release announcing the transaction, and Second Bidder informed Elite that it had no further interest in pursuing an offer for the company.[5]

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[3]In his affidavit, defendant Poole noted that Elite's Board considered that the draft merger agreement proposed by Solution 6 permitted Elite to terminate the Merger Agreement in favor of a superior proposal if required. (D.I. 43)

[4]The Merger Agreement contained a "no-shop" provision that prevented Elite from soliciting other proposals, and a "termination fee" provision that required Elite to pay Solution 6 a $3 million penalty within 48 hours if Elite decided to proceed with a superior offer. (Amend. Compl. ¶ 43) On December 14, 1999, Elite also entered into a Stockholders Agreement which "locked-up" approximately 20% of the voting shares in Elite in favor of Solution 6's acquisition of Elite. (Amend. Compl. ¶ 44)

[5]In her complaint, plaintiff alleged that defendants did not act reasonably to maximize shareholder value by deterring materially higher bids, not seeking to auction Elite, and not making an adequate effort to canvas the market for other acquirors. (Amend. Compl. ¶¶ 40-41)

On December 21, 1999, Elite and Solution 6 filed premerger notifications with the Securities and Exchange Commission ("SEC"), Federal Trade Commission ("FTC") and the Department of Justice.[6,7] The FTC requested additional information from the parties, and investigated the Merger during the first four months of 2000. The FTC's Bureau of Competition concluded that the Merger would give the combined entity approximately 70% of the time-and-billing market for the nation's 100 largest law firms, and on April 28, 2000, advised the parties that it would recommend that the FTC challenge the Merger. On May 5, 2000, Elite's Board met to discuss the FTC's decision, and decided to extend the tender offer for a few more days in the event that the FTC Chairman would overrule the recommendation. On May 10, 2000, after learning that the FTC Chairman declined to overturn his

[6]Elite filed with the SEC a Solicitation/Recommendation Statement on Schedule 14D-9 (the "14D-9 Solicitation"), and Solution 6 filed a Tender Offer Statement on Schedule 14D-1 (the "14D-1 Tender Offer"). The 14D-9 Solicitation referenced a "fairness opinion" from Elite's financial advisor which provided that the proposed transaction was fair. Plaintiff contends that there were omissions of material facts in the 14D-9 Solicitation, 14D-1 Tender Offer, and Fairness Opinion, including Elite's Fourth Quarter 1999 Results and the value and prospects of Elite.com, a new subsidiary of Elite. (Amend. Compl. ¶¶ 35-38)

[7]Plaintiff also alleged that several fundamental terms of the Merger were not to be disclosed to Elite's shareholders, but rather filed with the SEC after the shareholders voted. These included the bonuses and employment agreements to be given to Elite's employees, information that could have had a "material adverse effect" on the merger, the Stock Rights Plan Amendment, the fees to be paid to third parties, Elite's intellectual property rights, and benefits and stock options to be given to Elite's employees. (Amend. Compl. ¶ 39)

staff's decision, Elite's Board members voted to terminate the Merger Agreement.[8]

On December 22, 1999, the day after the premerger notifications were filed, plaintiff filed a class action suit in Los Angeles Superior Court against Elite, Elite's directors and Solution 6, alleging that they breached their fiduciary duties by entering into the Merger Agreement and sought to enjoin the Merger. On February 3, 2000, the Superior Court denied plaintiff's application for a temporary restraining order to enjoin the Merger. On February 15, 2000, plaintiff amended her complaint to include EIG and two officers of Solution 6 as defendants, and added various claims for breach of the duty of disclosure against the Elite defendants.[9]

On March 16, 2000, the case was removed from the Los Angeles Superior Court to the Central District of California. On March 23, 2000, the Elite defendants moved to dismiss the amended complaint. Plaintiff filed a motion to remand the case, but the court declined to rule on the motion and, sua sponte, transferred the case to the District of Delaware on May 1, 2000. The Merger

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[8]On May 11, 2000, Elite and Solution 6 issued a press release in which they stated that they "decided not to prolong discussions further with the FTC in light of the Commission's continuing opposition to the transaction." (D.I. 43, Ex. A)

[9]The "Elite defendants" are Elite, Poole, Rich, Epker, Noall, Finley and Seymour. The "Solution 6 defendants" are Solution 6, EIG, Montgomery and Tyler. Plaintiff is not seeking attorney's fees from the Solution 6 defendants. (D.I. 36)

Agreement was terminated on May 10, 2000, thereby rendering the lawsuit moot.

III. DISCUSSION

Under the common corporate benefit doctrine, a class representative or derivative plaintiff "who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit." United Vanguard Fund, Inc. v. Takecare, Inc., 693 A.2d 1076, 1079 (Del. 1997). Attorney's fees may be awarded to plaintiff's counsel even where a defendant corporation takes steps to settle or moot a case and in so doing produces a benefit similar to that sought by the shareholders' litigation. See Allied Artists Picture Corp v. Baron, 413 A.2d 876, 878 (Del. 1980). In such a case, a fee is awarded where the plaintiff can show that: (1) the suit was meritorious when filed; (2) an action producing a benefit to the shareholders was taken by the defendants before a judicial resolution was achieved; and (3) the resulting benefit to the shareholders was causally related to the plaintiff's lawsuit. See id.

In the case at bar, the court finds that plaintiff's lawsuit did not cause defendants to abandon the Merger. Defendants bear the burden of showing that there was no causal connection between the initiation of plaintiff's lawsuit and any subsequent benefit to Elite's shareholders. See United Vanguard Fund, 693 A.2d at

1080. See also Grimes v. Donald, 755 A.2d 388 (Del. 2000) ("The fact that the corporate action came after the stockholder's action is enough to create an inference that the two events were connected, and the corporate defendants have the burden of rebutting that inference."). Defendants have met their burden by presenting persuasive evidence that they abandoned the proposed Merger with Solution 6 because of the FTC's opposition to the Merger, and not because of plaintiff's litigation. Because the court determines that there existed no causal connection between plaintiff's lawsuit and defendants' abandonment of the merger, the court declines to address the remaining factors of the common corporate benefit doctrine.

IV. CONCLUSION

Therefore, at Wilmington, this 29th day of June, 2001;

IT IS ORDERED that:

1. The above-captioned action is dismissed as moot.

2. Plaintiff's motion for attorney's fees (D.I. 31) is denied.

United States District Judge